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No. 90-783

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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VILLAGE OF LOS RANCHOS DE ALBUQUERQUE, ET AL.,
PETITIONERS

*v.*

R.H. BARNHART, ADMINISTRATOR
FEDERAL HIGHWAY ADMINISTRATION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a city-funded bridge construction project qualifies as a "major federal action" or a "federal or federally assisted undertaking" that requires the Federal Highway Administration to secure project compliance with federal environmental statutes.

2. Whether the Federal Highway Administration is obliged to comply with federal environmental statutes in regard to the city's bridge construction project based on the requirement under Section 404b of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1344, that the city obtain a dredge-and-fill permit for the project from the United States Army Corps of Engineers.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 906 F.2d 1477. The district court opinion (Pet. App. 36a-65a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 2, 1990. The court of appeals denied the petition for rehearing on August 22, 1990. The petition for a writ of certiorari was filed on November 16,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case arises from a proposal by the City of Albuquerque, known as the North Valley River crossing project, to build new bridges over the Rio Grande River in the northwest part of the city. Although the Montano Bridge—the project component that is the subject of this petition—is to be funded and built exclusively by the City without any federal funds, Pet. 12, Pet. App. 5a-6a, petitioners nevertheless claim that the bridge is a "major federal action" requiring compliance by the Federal Highway Administration (FHWA) with procedural obligations imposed by the National Environmental Policy Act of 1969, 42 U.S.C. 4332 *et seq.* (NEPA),[1] the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (NHPA), and Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(f).[2]

1. In 1977, the local Urban Transportation Planning Policy Board (the Policy Board) began to study alternative bridge sites in the area around the pro-

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[1] For example, Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), provides that all agencies of the federal government shall prepare a detailed statement on the environmental consequences of, and alternatives to, "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

[2] Provisions in Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(f), are identical to those contained in the Federal-Aid Highway Act of 1968, 23 U.S.C. 138. These provisions are commonly referred to as "Section 4(f)," and are cited as such by the plaintiffs in their complaint. We will refer to the claims arising from these provisions as the "Section 4(f)" issue.

posed Montano project, focussing on the engineering feasibility of the alternatives and giving some consideration to environmental effects. Although it was determined early on in the project that no federal funding would be used to build the bridges, see pp. 4-5, *infra*, the City and the State of New Mexico decided to commence an environmental review process in accordance with federal requirements.[3]

In 1979, the Policy Board initiated the preparation of a full-scale Environmental Impact Statement (EIS) of the North Valley River crossing project with the State Highway Department serving as the lead agency (DX 2 (Bower) at 16).[4] The Federal

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[3] There were three reasons for the decision to proceed in this manner. First, the City continued to hope that the federal government might create some "windfall" funding suitable for application to this project. Mathias Vol. 1, at 111; DX 8 (Alonzo affidavit) at 2, ¶¶ 6, 7. In the unlikely event that such a windfall did become available, continued compliance with federal environmental review procedures would place the State in the best position to receive funding. *Id.* at 111-112, 116; DX 2 (Bower) at 89-90. Second, the City and State had represented to the public that the bridge projects would be developed according to federal procedures. Mathias Vol. 1, at 115-116; DX 2 (Bower) at 51-52; DX 10 (Hoover affidavit) at 2. Third, the City believed that compliance with these procedures was a better way to develop public projects. See DX 5 (Martin) at 29-30 (use of procedures in compliance with federal requirements "leads to better organization of project development").

(Exhibits to the Defendants' Motion for Summary Judgment in the district court (Docs. 99-101) are cited as "DX," with a short description of the document and a page deference. Thus, "DX 2 (Bower) at 14" refers to Defendants' Exhibit 2 to their Motion for Summary Judgment, which is the Bower deposition, at page 14.)

[4] The 1975 amendments to NEPA permit state highway agencies to prepare environmental impact statements, subject

Highway Administration (FHWA) provided technical advice and contributed $59,000 for expenses related to the preparation of the Environmental Impact Statement. DX 8 (Alonzo affidavit) at 2; Pet. App. 5a.

The Federal Highway Administration approved the Final Environmental Impact Statement on September 16, 1983, and, on January 23, 1984, issued a Record of Decision for that approval. Federal involvement ended at this point, however. After it became clear that there were insufficient federal funds for the bridge project and that devotion of federal funds to the project would exhaust the state's federal highway money for years to come,[5] the City of Albuquerque decided to finance the project exclusively through general obligation bonds. Pet. App. 6a.[6]

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to federal review and approval. 42 U.S.C. 4332(2)(D), added in Act of Aug. 9, 1975, Pub. L. No. 94-83, 89 Stat. 424.

[5] Together, the two proposed bridges were expected to cost at least $50 million. The total annual allocation to New Mexico of Urban System Funds—the only category of federal funds available to finance the bridges—was $4 million. DX 2 (Bower) at 6.

[6] After the Final EIS was approved in 1983, the projects were listed on the New Mexico State Highway Department's Five-Year Plan under the category of "Urban Relief Route—Unfunded." DX 2 (Bower) at 33. This category covered projects that were planned for execution within the next five years, but for which funding had not been identified. *Ibid.* The State had no plans to commit federal funds to projects in this category "and the people who were interested in those projects clearly knew that." *Id.* at 34-35.

Ultimately, the Paseo del Norte Bridge, which opened in December 1987, was constructed entirely with state and local funds. To quell opposition to the Paseo del Norte project, the State entered into an agreement and settlement with the petitioners providing that the State would "not provide any legal

The City proceeded to complete the design of the bridge and to begin right-of-way acquisition without any aid, assistance, or participation by the Federal Highway Administration.[7]

2. Petitioners filed suit in district court seeking a declaration that the Montano Bridge project is a federal action that must comply with federal environmental laws. Petitioners also sought an injunction against the Federal Highway Administration's further participation in the project, and an order declaring the approval of the EIS by the FHWA to be in violation of federal law. Pet. App. 38a-39a.

The federal defendants moved for summary judgment, urging that the Montano Bridge (the only project left in dispute after the settlement agreement concerning the Paseo del Norte Bridge, see note 6, *supra*) was not a federal project and that the FHWA therefore could not provide the requested relief. Finally, the FHWA argued that (1) petitioners lacked standing in failing to show how the federal government's actions had harmed them, since

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or technical advice," nor "participate in or provide assistance to the development of" other proposed bridge crossings, including the Montano River project. DX 11 (Settlement Agreement) at 15. This agreement, signed in October 1985, completely disabled the State from providing state funds for the Montano Bridge Project and from seeking federal aid for the project on behalf of the City. *Ibid.*

[7] The City has, however, sought and received a Corps of Engineers "dredge-and-fill" permit for the Montano Bridge pursuant to Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. The Section 404 permit is the subject of a separate action by petitioners against the Corps of Engineers challenging the Corps' compliance with NEPA and other environmental statutes, which is now on appeal before the Tenth Circuit. See *Village of Los Ranchos de Albuquerque* v. *Hatch*, 10th Cir. Nos. 90-2026 & 90-2052. See note 12, *infra*.

the project was being built by the City alone and (2) the suit was premature because the federal government's approval of the EIS was not "final agency action" subject to review under the Administrative Procedure Act.

The district court rejected the government's arguments on standing and ripeness (Pet. App. 45a-49a), but entered summary judgment for the federal defendants. The court held that the project was local, not federal, action, and that the FHWA therefore had no duties under NEPA, the National Historic Preservation Act of 1966, or the Department of Transportation Act. Pet. App. 49a-59a; 63a-65a.[8]

3. The court of appeals affirmed. Pet. App. 1a-33a. Relying on the reasoning in *Citizens for Balanced Env't & Transp., Inc.* v. *Volpe*, 376 F. Supp. 806, 812-813 (D. Conn.), aff'd, 503 F.2d 601 (2d Cir. 1974), cert. denied, 423 U.S. 870 (1975) [hereinafter *Citizens for Balanced Env't*], the court of appeals concluded that mere eligibility for federal funds does not create federal action sufficient to trigger federal environmental obligations. Pet. App. 12a-15a. The court of appeals rejected the reasoning in *La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974), in which a state agency that had taken preliminary steps to keep open the option of federal funding was enjoined

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[8] The court also held that the FHWA was not in violation of Exec. Order No. 11,990, which requires the federal government to minimize wetlands destruction, and that petitioners' factual assertions were insufficient to establish that the crossings project had been "improperly segmented" for NEPA analysis from a federally funded highway widening project several miles away. Pet. App. 59a-62a; see also Pet. App. 20a-26a.

from proceeding with a state-funded highway project without complying with certain federal environmental and relocation assistance requirements.

The court of appeals further rejected petitioners' argument that certain actions by the FHWA in the formative stages of the project—including the expenditure of $59,000 toward the $75,000 cost of the EIS and approval of the EIS—rendered the project federal or constituted major federal action triggering obligations under NEPA and other federal environmental statutes. Pet. App. 17a. The court noted that the EIS on which federal funds were expended was preliminary in nature, and that the amount expended was insignificant in light of the $10.3 million estimated cost of the entire project. The court further explained (Pet. App. 16a-17a):

> The fact that the state did voluntarily request a federal EIS, though they were not legally bound to do so, should not, without more, constrain the state to make the entire project federal. Unless the state is actually receiving or is planning to receive federal funding for a project, mere preparation and approval of an EIS is not 'major federal action.' * * * It would be anomalous indeed to say that in a case such as this, where there is no showing that the local defendants were involved in a sham transaction to evade federal environmental requirements, that the preparation and approval of an EIS is a major federal action for which an EIS must be prepared and approved.

The court of appeals characterized the role of the FHWA in the project as, at most, "g[iving] advice as to the location of the bridge." The court concluded that, absent some ability by the federal defendants to control the outcome or direction of the

project, this was not enough to establish a "major federal action." Pet. App. 20a.

4. Petitioners filed a petition for rehearing. They argued for the first time that the FHWA's actions should be classified as major federal action because it was known "from the beginning" that it would be necessary to obtain a dredge-and-fill permit from the U.S. Army Corps of Engineers for the Montano Bridge project pursuant to Section 404(b) of the Clean Water Act. Reh'g Pet. 5, 9. The court denied the petition for rehearing without opinion. Pet. App. 34a-35a.

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[9] For essentially the same reasons underlying its NEPA analysis, the court of appeals rejected petitioners' claims that the Montano bridge project was a "federally assisted undertaking" requiring compliance with the National Historic Preservation Act of 1966, 16 U.S.C. 470(f) (Pet. App. 26a-28a), and that it was a federal transportation project requiring compliance with Section 4(f) of the Department of Transportation Act. Pet. App. 28a-31a. The court also affirmed the district court's rejection of petitioners' claims, not renewed in this Court, that the bridge project had been "improperly segmented" (Pet. App. 20a-26a), and that the federal government failed to comply with Exec. Order No. 11,990. Pet. App. 31a-33a.

## ARGUMENT

Petitioners contend that the court of appeals' decision is in error because the court failed adequately to consider "extensive federal involvement" in the Montano Bridge project. Pet. i. The FHWA's role, however, was extremely limited and confined to only the preliminary stages of the project. After the City decided to proceed with the Montano Bridge project using only local funds, federal involvement came to an end. Because the Federal Highway Administration has no current role in the development and construction of the Montano Bridge, there is no federal action at all, much less major federal action that triggers procedural obligations under NEPA.

1. The requirements established by NEPA apply to any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). A number of courts have emphasized that, for NEPA to apply, there must be action by a federal entity. See *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (purpose of NEPA is "to inject environmental considerations into the *federal* agency's decisionmaking process") (emphasis added); *Macht* v. *Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990) ("NEPA requires *federal agencies*—not states or private parties—to consider the environmental impacts of *their proposed actions.*") (emphasis on last phrase added); *Park County Resource Council, Inc.* v. *United States Dep't of Agriculture*, 817 F.2d 609, 622 (10th Cir. 1987) (there is federal action requiring environmental compliance if federal government has "firm plans" to develop land); accord *Citizens for Responsible Area Growth* v. *Adams*, 680 F.2d 835, 839 (1st Cir. 1982).

In this case, the City of Albuquerque chose to prepare a full-scale environmental impact study. Subsequent approval of that study by the FHWA had the effect of temporarily keeping open the option of federal funding for the Montano Bridge, but the decision was made early in the project not to use federal funds. Where a project was originally treated as if it might become a major federal action, but instead becomes a purely local project before any environmentally significant step is taken, NEPA does not, and should not apply. As stated in the opinion for the district court in *Citizens for Balanced Env't*, 376 F. Supp. at 812 (which was adopted by the court of appeals in that case, 503 F.2d at 601-602):

> Solicitude for the environment cannot substitute for legislation. Congress has not applied NEPA to all highways that the states are *eligible* to fund with federal dollars. * * * The State's option to use federal dollars, though open virtually until the concrete is poured, is nonetheless an option, and the State's choice should not be restricted simply because one alternative of the option (using state dollars) might result in less adequate assessment of environmental considerations. If the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement.

Moreover, not only is it difficult to see why the FHWA should be required to execute the Montano Bridge project in a manner that complies with the requirements of NEPA, it is also difficult to see how it could do so. As the court of appeals observed (Pet. App. 19a (quoting *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988))), "the distinguishing feature of 'federal' involvement is the ability to in-

fluence or control the outcome in material respects. The EIS process is supposed to inform the decisionmaker. This presupposes he has judgment to exercise." Because the FHWA did not provide any funds for the actual construction of the Montano Bridge, it lacks control over the execution of the project. Here, the FHWA played, at most, a minor role in early stages of the project, but has not exercised (and will not exercise) any authority over the actual planning, construction or financing of the Montano Bridge itself. As a practical matter, the FHWA simply does not now have any "judgment to exercise."

2. Petitioners err in asserting that the court of appeals "arbitrarily removed from the scope of these [environmental] statutes every state highway project which had not, at the time it is challenged, received federal funds for * * * construction or had such funding approved." Pet. 20-21. The court of appeals did not hold that there is no obligation to comply with NEPA for projects that eventually *do* receive federal funds. Rather, the court of appeals held, correctly in our view, that mere eligibility for federal funding, *without more*, does not make a local project federal. Pet. App. 10a-15a. And since the preparation of an EIS is not in itself "major federal action" sufficient to trigger NEPA, eligibility for federal funding, even in combination with federal approval of an EIS at a preliminary stage, is not enough to establish federal action where the execution and financing of a project remains entirely under local control.

3. The analysis under the other environmental statutes cited by petitioners is similar. Procedural obligations under the National Historic Preservation Act of 1966 and Section 4(f) of the Department of Transportation Act require a measure of ongoing fed-

eral involvement not present here. See *Macht* v. *Skinner*, 916 F.2d at 15-16 n.4 (expenditure of federal funds for preliminary planning and environmental impact statements does not federalize an otherwise locally funded project under NEPA or Section 4(f)); *Maryland Conservation Council, Inc.* v. *Gilchrist*, 808 F.2d 1039, 1043 (4th Cir. 1986) (federal funds for preliminary planning was too small a portion of total project cost to render the project federal for Section 4(f) purposes).

4. Petitioners seek (Pet. 22-24 )to construct a circuit conflict between *Citizens for Balanced Env't*, upon which the court below relied, and the outdated and factually distinct decision in *La Raza Unida* v. *Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), aff'd, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 964 (1974). The supposed conflict between these cases, however, has been presented to this Court before and found unworthy of this Court's consideration. See *Citizens for Balanced Env't*, cert. denied, 423 U.S. 870 (1975). As the government pointed out in its brief in opposition to the petition for a writ of certiorari (at 4-5) in *Citizens for Balanced Env't*, No. 75-255, *La Raza Unida* "was not decided under NEPA," nor did the *La Raza* court consider the issue of major federal action under the current version of any of the environmental statutes cited by petitioner here. See *La Raza Unida*, 488 F.2d 559 (9th Cir. 1973) (listing statutory provisions at issue in that case). Thus, although the *La Raza* court made statements that appear to be at odds with the holdings in this case and in *Citizens for Balanced Env't*, there is no real conflict among these decisions[10] because

[10] Nor are the other cases cited by petitioners (Pet. 25-26) the source of any conflict. In all of these cases, the projects

there have been important intervening changes in federal environmental law since *La Raza*, and the regulatory scheme on which the *La Raza* court based its decision is no longer in effect.[11]

3. Finally, petitioners seek this Court's review of a question not addressed by the court of appeals, which was presented to that court for the first time in the petition for rehearing. Petitioners claim that the Montano Bridge project became a "major federal action" triggering NEPA obligations on the part of the FHWA very early in the planning phase when the need for a Corp of Engineers Clean Water Act permit for the project became manifest.

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in question had either proceeded with federal approval and funding through the design phase and to construction, or the evidence showed that those funds were avoided in a deliberate attempt to circumvent NEPA's obligations. See *Named Individual Members of San Antonio Conservation Soc'y* v. *Texas Highway Dep't*, 446 F.2d 1013, 1027 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972) (deliberate attempt to circumvent NEPA by improperly segmenting project); *Scottsdale Mall* v. *Indiana*, 549 F.2d 484, 489 (7th Cir. 1977), cert. denied, 434 U.S. 1008 (1978) (project had proceeded through design, preliminary engineering, and right of way acquisition); *Indian Lookout Alliance* v. *Volpe*, 484 F.2d 11, 16 (8th Cir. 1973) (no dispute that state seeking federal funding); *City of Boston* v. *Volpe*, 464 F.2d 254, 256-257 (1st Cir. 1972) (FAA allocated more than $1 million for taxiway construction).

[11] Since *La Raza* was decided 18 years ago, FHWA regulations have eliminated the discrete actions of location and design approval that the *La Raza* court had used as triggers for the obligation to comply with federal environmental obligations. The regulations now incorporate the procedures mandated by NEPA directly into the highway development process. Compare 23 C.F.R. Pt. 1, App. A, Policy and Proc. Mem. 20-8 (1971) with 23 C.F.R. Pt. 771 (1984).

Petitioner's contention must fail. Petitioners cite no court of appeals or other decisions holding a federal agency responsible for environmental compliance on the basis of federal action by a completely unrelated agency. Compare *Macht* v. *Skinner*, 916 F.2d at 18-19 (Department of Transportation has no NEPA or Section 4(f) obligations for local project, despite ultimate need for Corps of Engineers Section 404(b) permit). As the lower courts found in this case, there is no federal action by the FHWA that would obligate *that agency* [12] to insure compliance with federal environmental standards. Pet. App. 20a, 55a. Without such action, neither NEPA nor the other cited federal environmental statutes come into play.

Apart from the obvious flaws in this argument, review of this issue is not warranted because it was not properly raised in the court of appeals, and was therefore not addressed in the court of appeals' decision.

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[12] Petitioners have prosecuted a separate action against the only federal actor remaining, the Army Corps of Engineers, alleging violations of NEPA, the Clean Water Act, and the National Historic Preservation Act. *Village of Los Ranchos de Albuquerque* v. *Hatch*, Nos. 90-2026 & 90-2052 (10th Cir.). In that case, it is not disputed that issuance by the Corps of a permit under the Clean Water Act is federal action within the meaning of NEPA. The primary dispute centers on the extent to which that federal action will significantly affect the human environment. The district court concluded that the Corps of Engineers fully complied with its procedural obligations under NEPA and granted summary judgment for the government. That judgment is presently on appeal.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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